16-66

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~526.~~ 10087

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

WILLIAM W. CRANE, RUE P. HUTCHINS, SIDNEY L. CHAFFEE, AND DANIEL D. WELLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED MARCH 14, 1871.

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No. 526.

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1 At a circuit court of the United States, within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court-house, in the city of Cincinnati, in said district, on the first Tuesday of October, being the fourth day of that month, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States of America the ninety-fifth—

Present, the Honorable H. H. Emmons, and the Honorable H. H. Leavitt, judges of said court—

Among the proceedings had were the following, to wit:

THE UNITED STATES OF AMERICA
vs.
WILLIAM W. CRANE, RUE P. HUTCHINS, SIDNEY L. CHAFFEE, & DANIEL D. WELLS. } 1161.—Debt.

Be it remembered that heretofore, to wit, on the 17th day of April, in the year of our Lord, one thousand eight hundred and sixty-nine, came the plaintiffs, by Warner M. Bateman, esq., their attorney, and sued out of the clerk's office of the court aforesaid the writ of summons ad respondendum herein, which said writ is in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon William W. Crane, Rue P. Hutchins, Sidney L. Chaffee, and Daniel D. Wells, citizens of and residents in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio, aforesaid, at Cincinnati, on the first Tuesday in the month of May, 1869, to answer unto the United States of
2 a plea of debt. Debt $12,000; damages $5,000; due in equity $12,000; interest from August 16th, 1867. And have you then and there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States, this 17th day of April, A. D., 1869, and in the 93d year of the independence of the United States of America.

Attest:
[SEAL.] (Signed) JOHN McLEAN, *Clerk.*

Cause of action.

Upon which said writ is the following endorsement, to wit: Suit brought to recover the sum of $12,000 and interest thereon from August 16th, 1867, due on a transportation bond executed August 16th, 1867, by the defendants to the plaintiffs, for the transportation, within 60 days, of 2,886¼ gallons of highwines from the bonded warehouse of Crane & Hutchins, at Tippecanoe, Ohio, to the bonded warehouse of Church Homes, Boston, Mass., according to law; the condition of which is broken.

And afterwards, to wit, on the 21st day of April in the year last aforesaid, came the said marshal, to whom said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon, in the words and figures following, to wit:

Marshal's return.

Rec'd this writ at noon of April 19th, & served the same April 20th, 1869, by leaving a certified copy thereof at the residence & with the wife of Sidney L. Chaffee, and delivered to Rue P. Hutchins, Daniel D. Wells, and William W. Crane, each in person, a certified copy.

(Signed) A. HICKENLOOPER, JR.,
U. S. Marshal, S. D. O.,
By C. N. BURNS, *Deputy.*

3 And afterwards, to wit, on the eighteenth day of May, in the year last aforesaid, an entry was made upon the journal of said court in the words and figures following, to wit:

Entry.

On motion to the court it is ordered that the default in above case be, and the same is hereby, set aside, and plaintiffs have leave to file their declaration herein, forthwith; and the same is accordingly filed.

And which said declaration is in the words and figures following, to wit:

Declaration.—No. 1161.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

In the circuit court of the United States within and for the sixth circuit and southern district of Ohio, of the term of April, A. D. 1869.

The United States of America, plaintiffs, complain of William W. Crane, Rue P. Hutchins, Sidney L. Chaffee, and Daniel D. Wells, defendants in a plea of debt, that they render unto the plaintiffs the sum of twelve thousand dollars which they owe to and unjustly detain from the plaintiffs.

For that whereas heretofore, to wit, on the sixteenth day of August, A. D. 1867, at the district aforesaid, the defendants, by their certain writing obligatory of that date, sealed with their seals, and now to the court here shown, acknowledged themselves to be held and firmly bound unto the plaintiffs in the sum of twelve thousand dollars, for the payment whereof they thereby bound themselves, their heirs, executors, and administrators, jointly and severally, which said writing obligatory was and is subject to a certain condition thereunder written, whereby it was conditioned that if the said William W. Crane and Rue P. Hutchins shall transport or cause to be transported, and within thirty days from the date of said writing obligatory shall complete the transportation of the following-described merchandise, viz: Fifty barrels of highwines from
4 the bonded warehouse of Crane & Hutchins, at Tippecanoe, Ohio, directly to the bonded warehouse owned by Church Howes, at Boston, Massachusetts, and shall deliver or cause to be delivered to the col-

lector of internal revenue for the district in which such bonded warehouse is situated, or his officer in charge, and shall within fifteen days thereafter produce to the collector of internal revenue of the fourth district and State of Ohio, the certificate of such collector, showing that the said merchandize has been duly delivered and placed in the warehouse above designated according to law, then the said obligation is to be void; otherwise to abide and remain in full force and virtue; and although the said William W. Crane and Rue P. Hutchins, at and after the date of the said writing obligatory, to wit, on the day and year last aforesaid, did remove the said fifty barrels of highwines from the bonded warehouse of Crane & Hutchins, at Tippecanoe, Ohio, yet the said William M. Crane and Rue P. Hutchins, not regarding their duty in the premises nor the covenant of the said writing obligatory in that behalf, did not transport or cause to be transported and within fifteen days from the date of said obligation complete the transportation of said fifty barrels of highwines from the bonded warehouse of the said Crane & Hutchins, at Tippecanoe, Ohio, directly to the bonded warehouse of Church Howes, at Boston, Massachusetts, and deliver or cause the same to be delivered to the collector of internal revenue for the district in which such warehouse is situated or his officer in charge, and within fifteen days thereafter produce to the collector of the fourth district and State of Ohio, the certificate of such collector, showing that the said merchandize had been duly delivered and placed in the warehouse of the said Church Howes, according to law, but although often required by the plaintiffs the said William W. Crane and Rue P. Hutchins have wholly neglected and refused to comply with the conditions of their said obligation, contrary to the form of the statutes of the United States of America in such case made and provided, and contrary to the form of the obligation of the said William W. Crane, and Rue P. Hutchins, and Sidney L. Chaffee, and Daniel P. Wells, to the damage of the plaintiffs twelve thousand dollars; whereby the said writing obligatory has become forfeited to the plaintiffs and an action hath accrued to them to have and demand of the defendants the said sum of twelve thousand dollars above demanded and thereupon they bring this suit.

(Signed) WARNER M. BATEMAN,
U. S. Dist. Attorney, S. D. O.

And afterwards, to wit, on the 25th day of June, in the year last aforesaid, an entry was made upon the journal of said court in the words and figures following, to wit:

Entry.

On motion to the court it is ordered that the default herein be, and the same is hereby, set aside, and defendants have leave to plead herein within sixty days. And this case is continued.

And afterwards, to wit, on the 18th day of January, in the year of our Lord one thousand eight hundred and seventy, an entry was made upon the journal of said court in the words and figures following, to wit:

Entry.

On motion to the court the default in this cause is hereby set aside and defendants have leave to plead forthwith, and plea filed.

And which said plea is in the words and figures following, to wit:

Plea.

United States circuit court, southern district of Ohio.

UNITED STATES
vs.
WILLIAM W. CRANE & AL. } No. 1161

6 And now come the said William W. Crane, Rue P. Hutchins, Sidney L. Chaffee, and Daniel D. Wells, defendants, and, for a plea in this behalf, say that said plaintiffs ought not to have or further maintain this their said action against them, because they say that, after said William W. Crane and Rue P. Hutchins had failed to comply with the conditions of said writing obligatory, to wit, on the first day of January, 1868, the assessor of the fourth district of Ohio assessed against said William W. Crane and Rue P. Hutchins for said non-compliance with the conditions of said writing obligatory, the full taxes imposed by law on said fifty barrels of highwines, and said William W. Crane and Rue P. Hutchins paid to the collector of said fourth district of Ohio, during said month of January, 1868, in full all said taxes.

Defendants admit that said William W. Crane and Rue P. Hutchins did not pay, nor have they since paid to plaintiffs, the penalty assessed against them on said first day of January, 1868, for failure to comply with the conditions of said writing obligatory, and say that before said penalty became payable under said assessment, the law providing for said penalty was wholly repealed, without saving clause; and this they are ready to verify.

Wherefore defendants say they are not indebted to said plaintiffs upon said writing obligatory; that the same should be cancelled; and they pray judgment if said plaintiffs should have or further maintain this their said action against them.

(Signed) By H. L. BURNETT,
Their Attorney.

And afterwards, to wit, on the 25th day of January, in the year last aforesaid, came the plaintiffs, by Warner M. Bateman, esq., their
7 attorney, and filed in the clerk's office of the court aforesaid, their demurrer to plea of defendants herein, which said demurrer is in the words and figures following, to wit:

Demurrer.

U. S. circ't court.

THE UNITED STATES
vs.
WILLIAM W. CRANE ET AL. } No. 1161.

Now come the plaintiffs, by the district attorney, and say that the said plea and the matters therein contained are not sufficient in law.

Wherefore they pray judgment, &c.

(Signed) WARNER M. BATEMAN,
U. S. Att'y.

And afterwards, to wit, on the 10th day of June, in the year last aforesaid, an entry was made upon the journal of said court in the words and figures following, to wit:

Entry.

On motion to the court and by consent of parties, it is ordered that the default in the above case be, and the same is hereby, set aside and defendants have leave to file their joinder in demurrer in this case forthwith, and the same is accordingly filed.

And which said joinder in demurrer is in the words and figures following, to wit:

Joinder in demurrer.

United States circuit court, southern district of Ohio.

UNITED STATES
vs. } No. 1161.
WILLIAM W. CRANE & AL.

And the said defendants say that the plea aforesaid in manner and form as the same is by them pleaded, and the matters therein contained are sufficient in law to bar and preclude the said plaintiffs from having their aforesaid action against them, which they, the said defend-
8 ants, are ready to verify, and because the said plaintiffs have not answered the said plea nor denied the same; the said defendants pray judgment, and that the said plaintiffs may be barred from having or maintaining their said action against them.

(Signed) BURNETT, FOLLET & WRIGHT,
Att'ys for Def'ts.

And afterwards, to wit, on the 20th day of January, in the year of our Lord one thousand eight hundred and seventy-one, an entry was made upon the journal of said court in the words and figures following, to wit:

Entry of judgment.

This day this cause came on to be heard upon the demurrer of plaintiffs to the plea of defendants, and was argued by counsel and submitted; and the court, being fully advised in the premises, do find and adjudge that the said plea, and the matters therein contained, are sufficient in law to bar the said plaintiffs from their action against the said defendants. It is therefore considered by the court that said defendants go hence without day. To which finding and ruling of the court the plaintiffs, by counsel, except, and pray that the exception may be noted of record.

And afterwards, to wit, on the 24th day of February, in the year last aforesaid, came the plaintiffs, by Warner M. Bateman, esq., their attorney, and filed in the clerk's office of the court aforesaid, their bill of exceptions herein, which said bill is in the words and figures following, to wit:

Bill of exceptions.

In the circuit court. In debt.

THE UNITED STATES *vs.* CRANE ET ALIOS. } 1161.

Be it remembered that this cause came on to be heard before the judges of the circuit court of the United States for the sixth circuit and
9 southern district of Ohio, at the October, 1870, term of the said court on the demurrer theretofore filed by the plaintiffs to the defendant's plea, which, being argued by counsel, and the court being fully advised in the premises, did consider that the said demurrer was not well taken, and did overrule the same; whereupon the United States, by their district attorney, excepted and prayed that this, their bill of exceptions, might, by the said judges, be signed, sealed, and allowed; which is accordingly done.

(Signed) H. H. LEAVITT, [SEAL.]
One of the Judges of said Court.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, John McLean, clerk of the circuit court of the United States within and for said district, hereby certify the foregoing transcript to be truly taken and copied from the files and record of said court as the same remain in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati, this 24th day of February, A. D. 1871, and in the 95th year of the independence of the United States of America.

Attest:
[SEAL.] JOHN McLEAN, *Clerk.*

10 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States within and for the southern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea, which is in the said circuit court before you, between The United States of America, plaintiff, and William W. Crane, Rue P. Hutchins, Sidney L. Chaffee, and Daniel D. Wells, defendants, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the first Monday in the month of December next, in the said Supreme Court then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 24th day of February, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the United States of America the 95th.

Attest:

[SEAL.] JOHN McLEAN, *Clerk.*

(Indorsed:) No. 1161. U. S. circuit court, S. D. of O. The United States vs. W. W. Crane et al. Writ of error. Filed Feb'y 24th, 1871. John McLean, cl'k.

11 THE UNITED STATES OF AMERICA,
Supreme Court of the United States:

To William W. Crane, Rue P. Hutchins, Sidney L. Chaffee, and Daniel D. Wells, greeting:

Whereas the United States of America have obtained the allowance of our writ of error to the circuit court of the United States within and for the southern district of Ohio, directed to remove into the said Supreme Court, to be holden at the city of Washington on the first Monday in the month of December next, the record of a certain plaint, process, proceedings, and judgment, in an action of debt wherein you, the said William W. Crane, Rue P. Hutchins, Sidney L. Chaffee, and Daniel D. Wells, in that action lately recovered against the said The United States of America your judgment, as by the said record in the said circuit court remaining appears, in which said record and proceedings, and also in the rendition of the judgment thereupon, manifest error hath intervened, as by the said The United States of America we are informed, and our said writ of error, granted, issued, and allowed as aforesaid, for the purpose of correcting the errors aforesaid alledged, if any there be: You are, therefore, hereby commanded and cited to be and appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court to be holden on the first Monday in the month of December next, to have the errors aforesaid corrected, and the judgment of our said Supreme Court thereupon.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States of America, this 24th day of February, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the United States of America the 95th.

[SEAL.] H. H. LEAVITT,
One of the Judges of said Court.

12 (Indorsed:) No. 1161. U. S. circuit court, S. D. O. The United States vs. W. W. Crane et al. Citation. Filed Feb'y 24th, 1871. John McLean, cl'k.

We hereby acknowledge service of the within citation for William W. Crane, Rue P. Hutchins, Sidney L. Chaffee, and Daniel D. Wells, the defendants in error.

Cincinnati, Feb'y 24th, 1871.

BURNETT, FOLLETT & WRIGHT,
Att'ys for Def'ts in Error.

(Indorsement on cover:) No. 526. The United States, plaintiffs in error, vs. William W. Crane, Rue P. Hutchins, Sidney L. Chaffee, and Daniel D. Wells. S. Ohio C. C. U. S. Filed 14th March, 1871.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* SAMUEL H. BENNETT AND OTHERS.	No. 297.
THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* SAMUEL H. BENNETT AND OTHERS.	No. 298.
THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* WILLIAM W. CRANE AND OTHERS.	No. 299.
THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* WILLIAM W. CRANE AND OTHERS.	No. 300.

WRITS OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Brief for the United States.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THE UNITED STATES, PLAINTIFFS in error, v. SAMUEL H. BENNETT AND OTHERS. } No. 297.

THE UNITED STATES, PLAINTIFFS in error, v. SAMUEL H. BENNETT AND OTHERS. } No. 298.

THE UNITED STATES, PLAINTIFFS in error, v. WILLIAM W. CRANE AND OTHERS. } No. 299.

THE UNITED STATES, PLAINTIFFS in error, v. WILLIAM W. CRANE AND OTHERS. } No. 300.

WRITS OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Brief for the United States.

STATEMENT.

These cases being exactly alike, the brief in the first one of United States *v.* Bennett will cover the others.

This case is an action of debt in which the plaintiffs declared that, on the 19th of August, 1867, the

defendants, by their certain writing obligatory of that date, acknowledge themselves to be held and firmly bound unto the plaintiffs in the sum of $10,167, conditioned that Bennett and Carpenter shall transport, or cause to be transported, and within thirty days from the date of said writing obligatory shall complete the transportation of the following described merchandise, viz, fifty barrels of distilled spirits from the bonded warehouse of Bennett and Carpenter, at Greenville, Ohio, directly to the bonded warehouse owned by Church Howe, at Boston, Massachusetts, and shall deliver, or cause to be delivered, to the collector of internal revenue for the district in which such bonded warehouse is situated, or his officer in charge, and shall, within fifteen days, produce to the collector of internal revenue for the fourth district of Ohio, the certificate of such collector, showing that the said merchandise has been duly delivered and placed in the warehouse above designated, according to law.

The declaration further alleged that Bennett and Carpenter did remove the said fifty barrels of spirits from the warehouse at Greenville, Ohio; but did not transport them, or within thirty days from the date of said obligation complete the transportation of the same, "to the bonded warehouse of Church Howe, at Boston, and deliver the same to the collector of internal revenue thereat; and, within fifteen days thereafter, produce to the collector of the fourth district of Ohio the certificate of such collector, showing that the merchandise had been duly delivered and placed in the warehouse of the said Howes according to law.

The defendants pleaded that after said Bennett and Carpenter had failed to comply with the condition of said bond, the assessor of the fourth district of Ohio assessed them, for said non-compliance, the full taxes imposed by law on said fifty barrels of spirits, and that Bennett and Carpenter paid the taxes so assessed to him; and that the defendants "Bennett and Carpenter did not pay and have not paid the penalty assessed against them for failure to comply with the condition of said bond; because, before said penalty be-

came payable, under said assessment, the law providing for said penalty was wholly repealed without saving clause ; and this they are ready to verify."

Demurrer and joinder in demurrer.

The circuit court gave judgment for the defendants, and the case is brought here by writ of error.

The United States assign as error that the plea does not set forth a legal defence to the action.

ARGUMENT.

The plea admits—

First. The execution of the bond ;

Second. Breach of the condition of the bond ;

Third. Non-payment of all that the Government is entitled to receive under the bond ;

And the only defence is, that the statute under which the bond was taken has been repealed.

Whether the statute has been repealed or not is a question of law and not of fact, and although its repeal is alleged in the plea, this is not admitted by the demurrer.

Com. Dig. Pleader, Q, 6.
Gould Pl., (4th ed.,) 376, 439.
Foster *v.* Johnson, Hob., 56.
Millard *v.* Baldwin, 3 Gray, 484.
Lea *v.* Robeson, 12 Gray, 280, 285.

By the act of July 1, 1862, §§46, 47, (12, Stats. at Large, 449,) and July 13, 1866, §§40 *et seq.*, (14 Stats. at Large, 160 *et seq.*,) distilled spirits might be removed without payment of taxes, from a bonded warehouse owned by the distiller to any general bonded warehouse used under the internal-revenue laws, upon giving the bond, and under the other regulations therein prescribed. And, by section 23 of the act of March 2, 1867, (14 Stats. at Large, 482, 483,) it is enacted, "That, in case any bond, under which any distilled spirits shall have been withdrawn from a bonded warehouse, is forfeited by failure to furnish or produce, at the proper time, the evidence required by law or regulation, that the articles

named in the bond were duly received and actually stored in the warehouse or district to which they were shipped, or by other breach of the obligation, the obligors in the bond shall pay the total amount of duties upon the articles removed under the bond, together with fifty per centum upon that amount."

By the act of January 11, 1868, (15 Stats. at Large, 834,) it is enacted—

"That, from and after the passage of this act, no distilled spirits shall be withdrawn or removed from any warehouse for the purpose of transportation, redistillation, rectification, change of package, exportation, or for any other purpose whatever, until the full tax on such spirits shall have been duly paid to the collector of the proper district. And all acts and parts of acts inconsistent with the provisions of this act be, and they are hereby, repealed."

I.

The first question in this case is whether the repeal of those provisions of the law permitting spirits to be transported from one bonded warehouse to another upon giving a bond, and without payment of the taxes, so operated as to prevent the Government from afterwards maintaining a suit for a breach of the condition of a bond given in return for the permission to so transport spirits before the repeal of the statutes allowing it.

The express repeal of acts inconsistent with the act of January 11, 1868, does not have greater force than the statute would have without the repealing clause; for, although repeals by implication are not favored, a statute necessarily must repeal all previous statutes inconsistent with it. What statutes were inconsistent with the latter act in the judgment of Congress are not mentioned, but it is left to the courts to decide.

Where a penalty is imposed by a statute, which is afterward repealed without any saving clause, it is generally true that an action for such penalty cannot be maintained after the repeal, if the right to maintain the action depends solely on the statute. Such is the case

of Norris *v.* Crocker, (13 How., 429.) So in Insurance Co. *v.* Ritchie, the court decided that where a statute which alone gave a certain jurisdiction to the United States courts had been repealed without any saving clause, the jurisdiction of the courts ceased even as to cases then pending, the chief justice saying that "It is clear that when the jurisdiction of the cause depends upon a statute, the repeal of the statute takes away the jurisdiction."

5 Wallace, 541, 544.

But to assume that this case falls within these is to beg the whole question at issue. Unless there is some inconsistency between the act of January 11, 1868, and the 23d section of the act of March 2, 1867, the former act does not repeal the latter one; or, if it repeals it, repeals it only in so far as that section would seem to authorize bonds to be taken and spirits to be removed from a bonded warehouse after January 11, 1868, without payment of the tax.

"It is a question of construction," says Lord Ellenborough, "on every act professing to repeal or interfere with the provision of a former law, whether it operate as a total or a partial and temporary repeal. * * * The last act recites, indeed, that certain provisions of the former one should be repealed; but this word is not to be taken in an absolute, if it appear upon the whole act to be used in a limited, sense."

The King *v.* Rogers, 10 East, 569, 573.

The main purpose of the act of 1868 was to prevent the evils resulting from the removal of spirits from warehouses without the taxes having been paid. It is entitled "An act to prevent frauds upon the collection of taxes upon distilled spirits," and its purpose is fully accomplished by construing it as forbidding all such removals in future, without making it operate to take away the right of the Government to enforce penalties already incurred for failure to conform to the provisions of the repealed law. The 23d section of the act of March 2, 1867, does not authorize the removal of spirits

or the taking of a bond for such removal, but only declares what shall be paid in case of the breach of the condition of the bond given when spirits are removed. If this section is repealed, then it follows that after the passage of the act of January 11, 1868, the Government could not collect the duties which had been assessed upon spirits removed, for the whole section must stand or fall together.

The 23d section of the act of March 2, 1867, is not to be regarded as a punitive statute, but is a remedial one, the object of which, in exacting the fifty per cent. additional amount besides the duties, is to reimburse the Government for any loss they may have suffered by the non-performance of the condition of the bond.

Stockwell *v.* United States, 13 Wallace, 546, 547, 548.

This being so, the rule of law by which, when a criminal or penal statute is repealed, all prosecutions thereunder fall, does not apply; but it is a case where, for an injury suffered, the Government had obtained a vested interest in the amount given by the act of 1867, and can sue for it after the law permitting the removal of spirits upon the giving of bond has been abolished.

Grosset *v.* Ogilvie, 5 Bro. P. C. 75. 527—

Hitchcock *v.* Wade, 6 Ad. & El., 943.

Palmer *v.* Conley, 4 Denio, 374, and 2 Comst., 182.

II.

But if the law has been repealed, the bond in this case having been voluntarily given and not being itself illegal, the Government may still maintain an action for breach of it.

United States *v.* Hodson, 10 Wallace, 395.

G. H. WILLIAMS,
Attorney General.
C. H. HILL,
Assistant Attorney General.

Robert Clarke & Co., Prs., 65 West Fourth Street, Cincinnati, O. [*Oct.*, 1872.]

Supreme Court of United States.

The United States, Plaintiff in Error,

No. 298. *vs.*

Samuel H. Burnett, Ralph R. Carpenter, Rue P. Hutchins, and Mordecai Clark.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR DEFENDANTS IN ERROR.

J. D. COX,
H. L. BURNETT,
Of Counsel for Defendants in Error.

Robert Clarke & Co., Prs., 65 West Fourth Street, Cincinnati, O. [*Oct.*, 1872.]

Supreme Court of United States.

The United States, Plaintiff in Error,

No. 298. *vs.*

Samuel H. Barnett, Ralph R. Carpenter, Rue P. Hutchins, and Mordecai Clark.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR DEFENDANTS IN ERROR.

THE POINT IN THE CASE.

After the passage of the repealing act of January 11, 1868 (15 U. S. Stat. at Large, 34), the *penalty* of fifty *per cent.*, in addition to the taxes upon spirits removed or withdrawn from a bonded warehouse under section 23 of the act of March 2, 1867 (14 U. S. Stat. at Large, 482), can not be enforced.

THE CASE.

The case below was heard and disposed of upon the demurrer of the plaintiff in error to the plea of the defendants. The circuit court overruled the demurrer, and, there being no contest about the facts, judgment was thereupon entered for the defendants (Record, 5). The

cause comes to this court upon exception taken to the judgment overruling the demurrer.

The declaration set forth that Bennett and Carpenter were principals, and Hutchins and Clark sureties upon a "transportation bond," so-called, conditioned for the transportation of fifty barrels of distilled spirits from the bonded warehouse of said Bennett and Carpenter, at Greenville, Ohio, to the bonded warehouse of Church Howes, at Boston, Massachusetts, and the delivery of the proper certificate of collector of the latter district to the collector of the former district, showing the delivery at Boston; that the transportation and delivery were not made, and that the condition of the bond was thereby broken. Judgment was asked for the whole face of the bond. (Record 2, 3.)

The plea did not deny the breach of the condition of the bond; but alleged that *after* such breach, the assessor of Bennett and Carpenter's district assessed "for said non-compliance with the conditions of said writing obligatory, the full taxes imposed by law on said fifty barrels of distilled spirits, and said Samuel H. Bennett and Ralph C. Carpenter paid to the collector of said fourth district of Ohio, thereafter, in full, all said taxes." The plea further admits that Bennett and Carpenter did not pay "the *penalty* assessed against them on said first day of January, 1868, for failure to comply with the conditions of said writing obligatory," but alleges that, "before said penalty became payable under said assessment, the law providing for said penalty was wholly repealed, without saving clause." (Record, 4.)

The judgment of the court below, therefore, involved simply the proposition which we have above stated as the "point" in this case.

THE STATUTES.

The text of the 23d section of the act of March 2, 1867, 14 U. S. Stat. 482, under which this penalty is sought to be enforced, is as follows, viz:

"That in case any bond under which any distilled spirits shall have been withdrawn from a bonded warehouse is forfeited by failure to furnish or produce at the proper time the evidence required by law or regulation, that the articles named in the bond were duly received and actually stored in the warehouse or district to which they were shipped, or by other breach of the obligation, the obligors in the bond shall pay the total amount of duties upon the articles removed under the bond, together with fifty per centum upon that amount, and the collector of the district in which such bond is or may be given, may forthwith distrain upon any property, real or personal, subject to distraint or seizure, belonging to said obligors; and in case no such property can be found, the collector shall immediately forward the bond to the United States district-attorney for the proper district for suit, and notice of the breach of the obligation of any such bond shall be forthwith forwarded by the collector of the district to the commissioner of internal revenue."

The repealing act is entitled, An Act to prevent Frauds in the Collection of the tax on Distilled Spirits, approved January 11, 1868, and is as follows, viz: "Be it enacted &c., That, from and after the passage of this act, no distilled spirits shall be withdrawn or removed from any warehouse for the purpose of transportation, redistillation, rectification, change of package, exportation, or for any other purpose whatever, until the full tax on such spirits shall have been duly paid to the collector of the proper district. And all acts and parts of acts inconsistent with the provisions of this act, be and they are hereby repealed." (15 U. S. Stat. 34.)

It will be noticed that it repeals the acts and parts of acts which contain the whole system of "transportation in bond," so called, as well the provisions of the Act to reduce Internal Taxation, &c., approved July 13, 1866, (14 U. S. Stat. 98), as those of the act of March 2, 1867, above referred to.

Upon the case as stated and the statutes, we submit:

I. That the fact that the suit is for a bare penalty, as alleged in the plea, is confessed by the demurrer.

II. That if it were not confessed, the 23d section of the act of March 2, 1867, can only be so interpreted as to make the fifty *per cent.* additional, charged upon the "amount of duties," a penalty in fact.

III. That such penalty can not be recovered after the repeal of the law prescribing the penalty.

IV. That the fact that a bond was taken, does not remove the case from under the rule.

V. That the fact of such repeal without saving clause, is confessed by the demurrer.

VI. That there can be no question as to the fact of the repeal, on examining the Statutes.

VII. That the original declaration is not sufficient to sustain a judgment, and therefore, the judgment below can not be reversed, even if the plea were insufficient.

I. That the fact that the suit is for a bare penalty, as alleged in the plea, is confessed by the demurrer.

On this point, we only desire to call the Court's attention to the language of the plea itself, (Record, p. 4), which distinctly alleges that "the full taxes imposed by law, on said fifty barrels of distilled spirits," were assessed and paid *after* the alleged breach of the bond, and that only the penalty remained unpaid.

The demurrer is a general demurrer in briefest terms,

(Record, same page), and raises only the issue of law upon the facts as alleged in the plea.

II. That if it were not confessed, the twenty-third section of the act of March 2, 1867, can only be so interpreted as to make the fifty *per centum* additional charged upon the "amount of duties," a penalty in fact.

The language of the Statute itself, would seem to be sufficiently clear, and no extrinsic aid necessary to its satisfactory interpretation. It says: "the obligors in the bond shall pay the *total amount of duties* upon the articles removed under the bond, together with fifty *per cent.* upon that amount." The obligors, then, shall pay, first, the total amount of duties or tax, together with something else, something in addition, after the total amount, the whole, full complete amount, or sum of tax is paid. That which is to be recovered, in addition thereto, can not be duty or tax, it must be something else. What else, save a penal sum, could be included under the phrase, "together with fifty *per centum* upon that amount?" Fifty *per centum* of the tax, in addition thereto, is authorized to be recovered, for the "failure to furnish or produce, at the proper time, the evidence required by law, etc." This sum is imposed by the Statute as a punishment for non-performance of certain duties defined by Statute. It will certainly be conceded, that if "the evidence required by law, etc.," had been furnished or produced, no action for the fifty *per centum*, in addition to the tax, could have been maintained. Then it being penal in nature, a punishment imposed for the non-performance of a duty or violation of a statutory obligation, and being a pecuniary punishment, can it be anything but a penalty?

"By penalty, is understood, the punishment inflicted by law for its violation; the term is mostly applied to a pecuniary punishment." (2 Bouvier Law Dic. 324.)

Cross v. *United States*, 1 Gallison, 26:

"The total amount of duties imposed upon the articles removed under the bond," would have to be paid whether

the "evidence required by law, etc.," was furnished or not—if not furnished, then by the obligors of the bond; if furnished, then by the persons to whom the spirits were delivered—at all events, the fifty barrels of spirits must pay their tax of $2.00 per gallon. As to this "fifty *per centum*," in addition to the tax, it was entirely discharged as soon as the party "furnished the evidence required by law, etc.," and had no further existence as against anybody. But, as to these additions to the original tax or duty, for some non-compliance with the provisions of the statute, we have some similar legislative action that serves to fix the character of these additions as *penalties*.

By the thirteenth section of the act of March 1, 1823, (3 Stat. at Large, 735) it is provided.

"And if the value at which the same shall be so appraised shall exceed by twenty-five *per centum*, the invoice prices thereof, then, *in addition* to the ten or twenty *per centum*, as the case may be, laid upon correct and regular invoices according to law, there shall be added fifty *per centum* on the appraised value, on which aggregate amount, the duties on such goods, wares, or merchandize, shall be estimated. *Provided:* That nothing herein contained shall be construed, to impose the said *penalty* of fifty *per centum* for a variance between the *bona fide* invoice of goods produced in the manner specified in the proviso in the fifth section of this act, and the current value of the said merchandize in the country where the same may have been originally manufactured or produced."

Here, the addition of fifty *per centum* to the appraised value, is designated by Congress as a *penalty*. And again, in the fifth section of the same act, the following language is used: . . . "Except in cases where goods are subjected to the *penalty* provided for in the thirteenth section of this act, etc."

The 17th section of the act of August 30, 1842, (5 Stat. at Large, 564) has the following proviso: "That in all cases where the actual value to be appraised, estimated, and as-

certained as hereinbefore stated, of any goods, wares, and merchandise, imported into the United States, and subject to any *ad valorem* duty, or whereon the duty is regulated by or directed to be imposed or levied on the value of the square yard, or other parcel or quantity thereof, shall exceed by ten *per centum* or more, the invoice value, then, in addition to the duty imposed by law on the same, there shall be levied and collected on the same goods, wares, and merchandise, *fifty per centum of the duty imposed on the same*, when fairly invoiced." Almost the identical language used in the 23d section of the act of March 2, 1867. And upon the question being submitted to the Attorney General, the Hon. Mr. Legaré, by the Secretary of the Treasury, the Hon. John C. Spencer, whether this additional fifty *per centum* was, or was not a penalty which the Secretary of the Treasury could remit, the Attorney General responded: "I am very clear that the fifty *per cent.*, in addition to the duty imposed by law on the description of goods mentioned in the last proviso of the 17th section of the act of 1842, is a penalty." 4 Opin. 182. 5 ibid 72 2. Mr. Wirt

III. That such penalty can not be recovered after the repeal of the law prescribing the penalty.

The general rule is, that, "When a criminal statute is repealed, and there is no provision in the repealing statute, saving offenses or pending prosecutions under it, no conviction after such repeal can be legally had under such criminal statute. It has long been established, that when an act of parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed." (*Calkins* v. *State*, 14 Ohio Stat. 222–231.)

The same rule applies as to prosecutions for penalties, or forfeitures under the revenue laws.

"It is an established rule, that where an action for the recovery of a penalty, or a proceeding to enforce a forfeiture, prescribed in a legislative act, is pending at the time of the repeal of the act, or instituted after the repeal, such repeal is a bar to the action or proceeding in the absence

of a saving clause in the repealing act." (*U. S.* v. *Six Fermenting Tubs, etc.*, Hodson claimant, Int. Rev. Rec., vol. 8, p. 9.)

In the case of *Yeaton and others, Claimants, etc.*, v. *The U. S.*, 5 Cranch 281, Chief Justice Marshall, in delivering the opinion of the Court, says: . . . "It has been long settled, on general principles, that after the *expiration* or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

In *Norris* v. *Crocker*, 13 How. 429, which was an action for a penalty of $500, secured by the Fugitive Slave Act of 1793, the Court says: "As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject matter. And in the next place, as the plaintiff had no vested right in the penalty, the legislature might discharge the defendant by repealing the law."

And, as is succinctly stated by Mr. Chase then, of counsel in the case, "The whole matter is summed up in an expression of Mr. Chief Justice Taney, in *Maryland* v. *The Baltimore and Ohio Railroad Company*, 3 How. 534: 'The repeal of the law imposing a penalty is itself a remission.'"

In *Butler* v. *Palmer*, 1 Hill 324, Cowen J., in delivering the opinion of the Court, uses the following language: "The effect of such a clause (repealing clause), on a previous statute which imposes a penalty, or confers jurisdiction upon a Court, even in civil cases, is not denied. In the first case, the penalty is gone, though repeal take place while the prosecution is pending."

The adjudicated cases then are full and conclusive, and our citations might be almost unlimited, that "no judgment can be rendered in any suit for a penalty after the repeal of the act by which it was imposed."

IV. The fact that a bond was taken, does not remove

the case from under the rule that the repeal of the law is a bar to the prosecution of a suit for the penalty.

The *State* v. *Youmans*, 5 Ind. 280, was a suit on a sheriff's bond, which was drawn in the usual form, and conditioned for the faithful discharge of the duties of his office. A breach of the bond was alleged, and suit brought, based upon an act in force when the suit was instituted, which provided that if any officer "shall neglect or refuse to return any writ of execution to the Court to which the same is returnable, on or before the return day thereof, he shall be amerced to the amount, with interest and costs due on such execution." (R. S. Ind. 1843, c. 40, s. 462.) While the suit was pending, a statute was passed amending this section, and adding a repealing clause, "that all laws and parts of laws conflicting with the provisions of this act are, so far as they conflict with the same, hereby repealed." (Acts of 1849, p. 64.) The Court held that the section first above quoted "was evidently repealed by the amendatory act, without any provision relative to pending suits. Hence it is contended that the plaintiff can not recover under the repealed law. We concur in that opinion. The act of 1843 clearly imposed on the Sheriff a penalty for neglecting to return an execution within the prescribed time. The language is, 'he shall be amerced to the amount, with interest and costs due on the execution.' This leaves no room for construction. It is true, if a party under a prior statute has acquired a vested interest, its subsequent repeal would not affect his rights; but that principle is not applicable to the case at bar, because, in a penalty, there can be no vested right until it has been reduced to a judgment. A mere penalty never vests, but remains executory. If it does not become executed before a repeal of the statute creating the right of action, the penalty falls with the law, and can not be thereafter enforced."

To the same effect was the decision in the case of *Thompson, Treasurer, etc.* v. *Bassett et al.* (Id. 535.) This was an action of debt upon a penal bond, given to the

Treasurer of Daviess county, conditioned that Bassett, who had been licensed to retail spirituous liquors, should not permit gambling, etc., in his house, but should observe the laws, etc. Breaches of the conditions were assigned in the declaration, and demurrer filed to declaration. The Court sustained the demurrer, and held that the license law under which the bond in question was executed, having been repealed, there could be no recovery on bonds taken under said law.

So that a bond having been given which covered penalty as well as tax, does not alter or abrogate any of the rules of law which apply to actions for the recovery of penalties.

V. The fact of such repeal without saving clause is confessed by demurrer.

The language of the plea is explicit, viz: "that before said penalty became payable under said assessment, the law providing for said penalty was wholly repealed, without saving clause." (Record, p. 4.)

Even had the language been less exact, the rule, that on demurrer the pleading shall be construed most favorably to the party pleading, would leave no doubt as to the admission of the fact by the demurrant.

VI. There can be no question as to the fact of the repeal on examining the statutes.

The repealing act of January 11, 1868, is quoted above in full. All acts and parts of acts inconsistent with it are absolutely repealed, with no mention of saving penalties or suits.

The only inquiry pertinent, therefore, is, what are the statutes and parts of statutes thus repealed? And to this question but one reply is possible, viz: All the acts and parts of acts which established and executed the system of transportation of distilled spirits in bond. When we have indicated them, we have the list of statutory provisions which have ceased to be operative. That the 23d section

of the act of March 2, 1867, is one of the them, is indisputable.

As to the language of the repealing act, the attention of the Court is called to the fact that it is identical with that which received judicial construction in the case of *State* v. *Youmans*, 5 Ind. 230, quoted above.

Under this head we note in passing, that although the payment of the full amount of the taxes in this case makes it unnecessary to inquire as to the validity of the bond so far as the taxes are concerned, yet we do not question that the bond would be good for such taxes, because to that extent it would simply be matter of contract for an amount due the government at the time of the execution of the instrument. The right of the government would be a vested one under the contract to the extent of the taxes, and would not be affected by the repeal of the law. This distinction is clearly recognized in the case of *State of Indiana* v. *Youmans* above quoted, and in the whole class of authorities to which it belongs.

VII. That the original declaration is not sufficient to sustain a judgment, and therefore the judgment below can not be reversed, even if the plea were insufficient.

This declaration attempts to set forth the breach of the condition of the bond and the damages resulting. The bond is for a gross sum much larger than the taxes and penalty. It was optional with the plaintiff below to assign breaches, either in his declaration or his replication; but if he assigns them in the declaration at all, they must be assigned with certainty and particularity, so as to show the injury and the amount for which recovery could be had if the demurrer to the plea had been sustained.

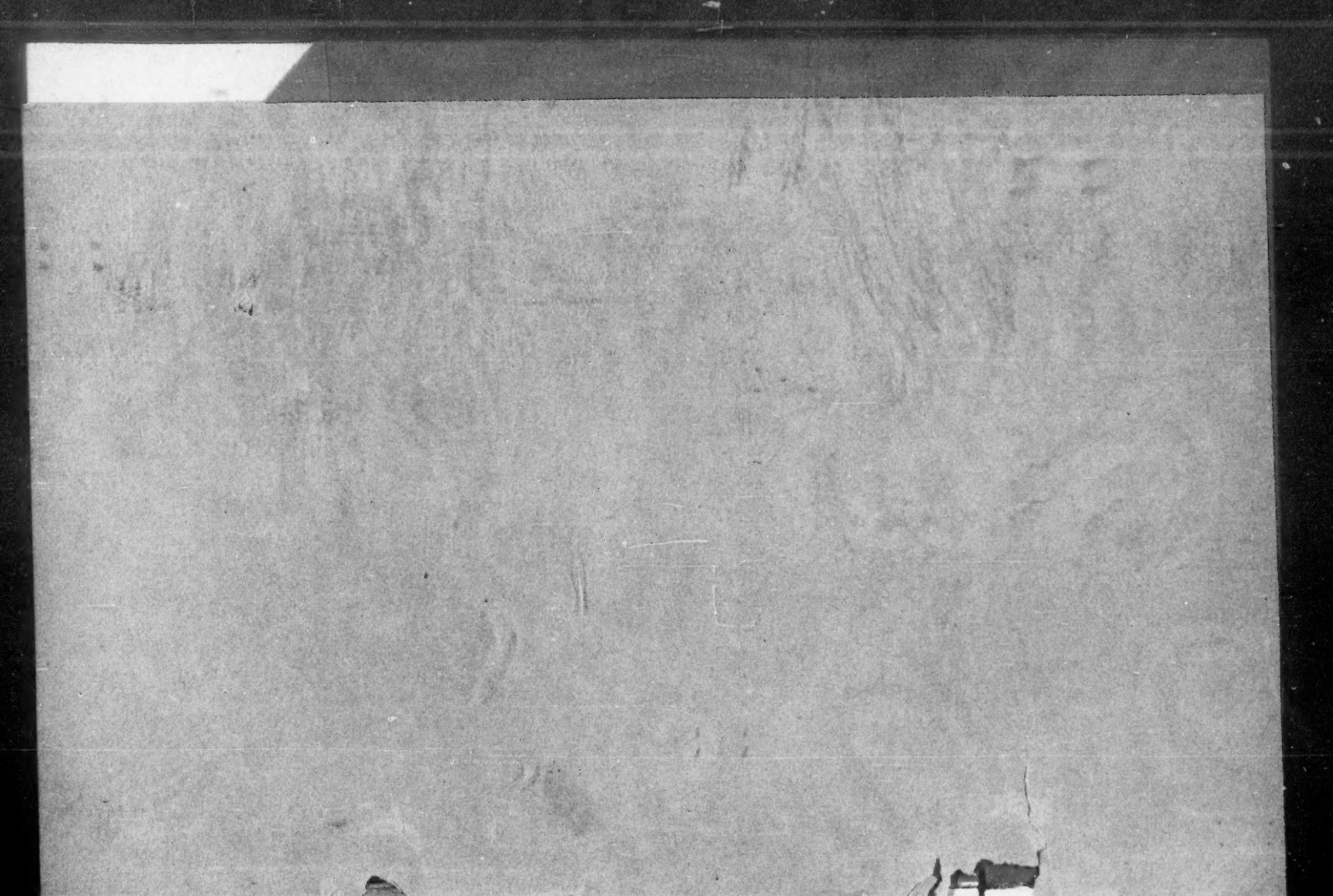
"The breach of the conditions of a penal bond constitutes, in fact, the basis of the plaintiff's action, and it should be assigned with certainty and particularity so as to show the damage." (*Campbell and Wife* v. *Strong*, Hempstead, 265.)

"When the declaration itself sets out the condition of the bond, it is then like a declaration upon the covenant; and the law, as laid down by the judge (in Minor's case), is exactly applicable to such a case. The Court, therefore, is still of the opinion that the declaration will not support a judgment for the plaintiff." (*Hazel* v. *Waters*, 3 Cranch C. C. 682, 683.)

The case referred to in the above quotation is that of *Minor* v. *Mechanics Bank of Alexandria*, 1 Peters, 67, which see.

See also *Van Benthuysen* v. *Dewitt*, 4 Johns. 213; *Bas* v. *Steele*, 3 Wash. C. C. 381; *Boyden* v. *Burke*, 14 How. 582.

We invite the attention of the Court to the fact that cases 297, between same parties; 299, *United Sates* v. *Crane, Hutchins et al.*, and 300, *United States* v. *Crane, Hutchins et al.*, together with the case herein presented are precisely alike in character, the pleadings being similar, and the judgment of the Court below the same.

We would therefore request that they may be heard together, and the present brief received as applicable to them all.

J. D. COX,
H. L. BURNETT,
Of Counsel for Defendants in Error.